BRIEF IN SUPPORT OF PETITION

I.

THE OPINIONS OF THE COURTS BELOW

(a) The Honorable John Boyd Avis, D. J. filed a memorandum opinion sur motion for a new trial (Record p. 12) as this is written it is still unreported.

(b) The Circuit Court of Appeals for the Third Circuit filed an opinion on the 6th day of January 1942 per Jones Circuit Judge (Record p. 29) as this is written it is still unreported.

(c) The Circuit Court of Appeals for the Third Circuit filed an opinion entitled "Order" amending and modifying the above opinion on the 6th day of March 1942 per Jones, C. J. (Record p. 51) as this is written it is still unreported.

II.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 347 of 28 U. S. C. A., being Section 240 of the Judicial Code as amended (March 3, 1891, Chapter 517, Section 626 Stat. 828; March 3, 1911, Chapter 231, Section 240, 36 Stat. 1157; February 13, 1925, Chapter 229, Section 1, 43 Stat. 938), and Section 723a, 28 U. S. C. A. 48 Stat. at Large 926, Chapter 49, p. 399, March 8, 1934—47 Stat. at Large 904, Chapter 119, page 904, February 24, 1933—Rules of the Supreme Court of the United States adopted May 7, 1934, (292 U. S. 661).

III.

SPECIFICATION OF ERRORS

1. The United States Circuit Court of Appeals for the Third Circuit erred in affirming the judgment and sentence of the United States District Court for New Jersey No. 8728 B (Record p. 35).

2. The United States Circuit Court of Appeals for the Third Circuit upon re-hearing erred in affirming the judgment and sentence of the United States District Court for the District of New Jersey No. 8728 B (Record p. 55).

3. The United States Circuit Court of Appeals for the Third Circuit erred in overruling all and sundry the Petitioner's assignments of error filed in the said Court sur the appeal herein (Record p. 35).

4. The United States Circuit Court of Appeals for the Third Circuit upon re-hearing erred in overruling all and sundry the petitioner's assignments of error filed in said Court sur the appeal herein (Record p. 55).

IV.

STATEMENT OF THE CASE

In an endeavor to avoid repetition and to keep this brief within reasonable dimensions, the petitioner will not at this place repeat the elaborate narrative concerning the evidence adduced at the third trial of this case because it is found set out in paragraph 2 of the Petition for Certiorari ante. It is however necessary to state, that now, since the only serious question remaining in the record of the Court below which forms the sole foundation of the present Petition for Certiorari, that, that part of the record will receive at this place specific care and elaboration. This task is neither as simple or easy as it might be, because of the latest revision of the rules of the Court below which requires and insists that so far as testimony is concerned none be printed in the record except that which bears directly upon the assignments of error intended to be pressed in that Court. As a result of this requirement the entire testimony adduced at the trial was not printed in the record of the Court below and consequently can not be referred to here. It, therefore, becomes essential by way of explanation to supply by way of narrative some preliminary exposition as to what this missing testimony tended to show. It was the theory of the petitioner's defense that he was in no wise concerned in the operation and setting up of the still which was the subject of the prosecution and that he had no connection with it or even had knowledge that it existed, he being a mere customer of certain of the defendants for the purpose of retail sale and distribution in the southwestern part of the City of Philadelphia. On the other hand it was the Government's contention that the

petitioner was the financial support of the enterprise and hence the principal participant. To further the Government's theory it produced one of the co-defendants, Michael DeLeone, to prove that after the arrest of Michael and some other of the defendants and the seizure of the still by the Government agents, a meeting was had at Montgomery's house in Philadelphia at which Michael DeLeone and his brother Leo DeLeone, whom the Government did not indict or implicate, for the purpose of having the petitioner Montgomery interest himself in the defense of those arrested. Montgomery, at that time had not been arrested in connection with the transaction. Therefore, to strengthen and corroborate the testimony of Michael DeLeone, touching this incident, and after Montgomery's denial thereof in his defense, the Government in rebuttal called the witness Leo DeLeone to achieve the corroboration of his brother Michael, and by this devise to reinforce the Government's theory of the petitioner Montgomery's guilty implication. Thus it was manifest that the credibility of Leo DeLeone became basic and consequently any assault on that credibility became highly important to the petitioner's defense. Consequently, we think, that this is as fitting a place as any to enlarge upon the exact situation bearing upon the subject as it transpired in the course of Leo DeLeone's cross-examination. That cross-examination by the petitioner's counsel which is the basis of all the petitioner's contention here proceeded as follows:

"Q. Are you married?

A. Yes, sir.

Q. Do you have any children?

A. Yes, sir.

Q. Does your wife and children live with you?

A. No, sir.

Mr. Schalick: I enter an objection. Not proper cross-examination.

The Court: I don't think that is any cause for affecting the witness' credibility. Sustain the objection and strike the answer.

Q. You were also arrested in 1938 for non-support?

Mr. Schalick: I enter an objection.

Mr. Serody: It goes to credibility.

The Court: Not the question of an arrest. Sustain the objection.

Q. You were convicted and an order was made against you by the Domestic Relations Court of Philadelphia?

Mr. Schalick: I enter an objection.

The Court: Sustained. We cannot try marital matters here." (Record p. 27)

It will be seen that this restriction of cross-examination became one of the subjects of the motion for a new trial, the memorandum opinion of the trial judge and assignments of error, the original opinion of the Court below and its opinion upon re-argument (Record pp. 12, 29 and 51) and to repeat, by a process of elimination is the exclusive foundation of all the questions earnestly pressed by the petitioner in this petition.

V.

ARGUMENT

(A) That the theory of crimen falsi as a factor limiting cross examination to test credibility is not law.

It is plain that at the end of the eventful and strenuous journey that this case has had in the Courts below, its final resolution is found in the concluding paragraphs of the opinion of the Court below entered upon the application for a re-hearing, manifesting the success of the petitioner in inducing the Circuit Court of Appeals to reject its earlier evidently untenable position and planting itself behind this last bastion. We quote again (Record p. 54):

> "It may therefore be taken as the rule that in the trial of criminal cases federal courts are bound by such rules of procedure and evidence as Congress prescribes and such further rules as the federal courts have adopted or from time to time may adopt in the light of general authority and sound reason. So treating with the question raised in the instant case, we believe the rule with respect to impeachment for former conviction, as generally applied by federal courts in criminal cases, to be that it is only convictions for felony or misdemeanors amounting to crimen falsi which are admissible to impeach a witness' credibility. The crime of desertion falls within neither of these categories. It is not a felony (being specifically denominated a misdemeanor) nor is it a misdemeanor which amounts to crimen falsi. The law would hardly impute unworthiness of belief to one of the parties to marital differ-

ences merely because of such differences. The fault in such regard might not even lie with the one sought to be impeached. We therefore conclude that the learned trial judge did not err in excluding the evidence which the defendant proferred for the impeachment of the witness Leo DeLeone.

The judgment of the District Court is affirmed." (Record p. 55)

We submit that the Court below would have not made this declaration had it appreciated the existence in this Court of the case of

Tla-Koo-Yel-Lee vs. U. S., 167 U. S. 276-277 (1896).

which we submit by the process of negation demonstrates the non-existence of the crimen falsi notion in criminal trials in federal courts.

That was an appeal from a conviction for homicide coming here from the District Court of the Territory of Alaska and this Court's opinion was delivered by Mr. Justice Peckham. In the reported case the Government's principal witness was an Indian woman, and it is inferable from the opinion and appears from the record which the writer has examined, that, at the time of her testimony she was a married woman. To assail her credibility defendant's counsel endeavored on cross-examination by direct interrogation of the witness to reveal that she presently sustained adulteress relations with another Indian not her husband. Upon an objection, the trial court prevented this interrogation and it was assigned for error in this Court. Mr. Justice Peckham held that the inquiry was entirely proper for the purpose intended and the judgment was reversed. The opinion contains not a syllable or intimation concerning crimen falsi and as at this writing there is avail-

able to the writer no copy of the criminal code of Alaska operating in 1894 the date the case was tried. The writer nevertheless takes the hazard of asserting that the code of Alaska did not make adultery at that time a felony which some Courts have thought to be the inevitable basis of the crimen falsi bedevilment of which more hereafter.

Do we overlook the element of moral turpitude in the cited case? We do not, but reserve it for further attention.

What then is crimen falsi?

A learned federal judge has pointed out that there can be no crimen falsi where the conviction does not render the convict incompetent to testify

U. S. vs. Baugh, 1 Fed. 787 (1880).

and this is likewise the conclusion of the celebrated Sir William Scott in

The Ville deVarsovie, 2 Dodson 188-165 Reprint 1457 et seq. (1817).

and indeed that eminent Judge in the same case holds that at common law crimen falsi is undefined and undefinable.

Idem.

So, the fundamental is, the ascertainment of incompetency of the convict by reason of conviction. For, it appears to us unescapable, if no such incompetency exists, the concept of crimen falsi falls for the want of a foundation. The goal being so fixed, the inquiry therefor is, did, at the time of the trial in the Trial Court, there exist in the relevant jurisdiction, the States of New Jersey and Pennsylvania and the Federal Court in the latter State, any incompetency by reason of the conviction for crime. Observe, a little in the reverse order, that in the Federal Court the

doctrine of disqualification of convicts to testify because of conviction is expressly repudiated

Rosen vs. U. S., 245 U. S. 467 (1918).

and in New Jersey the same result is achieved by force of express statutory enactment.

2 *N. J. S. A.* 97-1.

And except in the case of a convicted perjurer the result is the same in Pennsylvania.

Comm. vs. Clemmer, 190 Pa. 202, 42 Atl. 675 (1899);

19 *Purdon*, Section 681-682.

Thus we believe, in the present record, the factor of crimen falsi never could have any operation, having shown that the doctrine is bedded in incompetency and that such incompetency has been swept away by force of the principles enunciated in the statutes and the cases referred to, or to restate it tersely, where there can be no incompetency there can be no crimen falsi. Thus, the principle, involved here, cannot be confined in this imaginary category as is attempted by the Court below, and other cases, to which it refers as in majority, but does not by other means identify.

This is the appropriate place, we think, having freed ourselves of the bogey of crimen falsi, to discover what are the true limits to impeachment of credibility of a witness at common law, and here we receive unexpected assistance in an indirect fashion from this Court.

In relatively recent time this Court decided the case of

Alford vs. U. S., 282 U. S. 687 (1930).

and in the course of the opinion in that case at p. 693 cited the case of

Rex vs. Watson, 32 Howell State Trial 284 (1817).

This case is also reported in a much more lawyerlike manner by that eminent authority on the law of evidence Starkie in

2 *Starkie* 150, 171 Reprint 640 (1817).

In a careful consideration of that case, which this Court has sanctioned in the manner above indicated, and reinforced by authorities immediately to be noticed, we assert the true common law rule to be *that a witness may be asked any question that may impeach his credibility except that which may incriminate him or expose him to a forfeiture or penalty upon claim of privilege upon these grounds by him* regardless of the character of the inquiry:

Phillips Evidence, 4th Am. edition Volume 2, pp. 947, 948, 949;
Starkie Evidence, 10th Am. edition 210 et seq. (1876).

and as it is firmly established that the credibility of witnesses is a question of fact for the jury

U. S. vs. Lotsch, 102 Fed. 2d 35 (1939);
U. S. vs. Hannon, 105 Fed. 2d 390 (1939);
Flowers vs. U. S., 83 Fed. 2d 78 (1936).

We submit, that whether a given question impeaches the credibility *is a question of fact* and not of law as indicated by the Court below. More than that we submit that to meet the requirements of this rule the subject of the inquiry is not confined to criminal acts whether they be felonies or misdemeanors and may be predicated upon the idiosyncrasies of the witness or other matters wholly outside of the realm of the administration of criminal law, save only, that in the judgment of the jurors alone these factors undermine the credibility.

(B) That if moral turpitude is a factor to undermine credibility, does the desertion of wife and children, made a misdemeanor and punishable by fine and imprisonment by law, constitute such moral turpitude.

When we were discussing some pages back the case of

Tla-Koo-Yel-Lee vs. United States, supra,

we reserved the question of the factor of moral turpitude as a quality impeaching credibility, and did so because the element of adultery as involved in that case measured by the prevalent civilized standards certainly constituted moral turpitude, but if the question was still open to the writer having regard to the fact that the parties to the liason were Indians, doubt upon this phase might be engendered in his mind until such time as he should be informed by authoritative ethnological sources touching the laws, habits, and customs pertaining to sex relations among Indians in the vicinity of Fort Wrangle in 1894, because a definition of moral turpitude seems almost as mercurial as that of crimen falsi, especially so, since research shows this Court has never defined moral turpitude. However that may be, the phrase has been defined, but without affording much comfort and satisfaction to any true student of the criminal law. The definition is, that moral turpitude is an act of baseness, vileness or depravity in private and social duties owing to fellow men or society in general, contrary to accepted and customary rules, and need not be punishable by law.

United States ex rel. vs. Uhl, 16 Fed. Supp. 429 (1936);

Ng Sui Wing vs. United States, 46 Fed. 2d 755 (1931);

United States ex rel. vs. Reimer, 30 Fed. Supp. 768 (1939).

It is strange indeed that this definition of moral turpitude should so closely coincide with what has been said a few lines back concerning the zone of permissible impeachment unlimited by consideration of the criminal law. We now stress moral turpitude because the term appears with great frequency in those cases upon which the Court below relies, but does not name, said to establish a majority rule and therefore the undertaking of the petitioner when he seeks to come into the purview and protection of the so-called majority cases need only demonstrate that desertion of wife and children constitute moral turpitude with or without statutory condemnation and that he does by inquiring whether such delinquency is not an act of baseness and depravity in private and social duties owing to the wife and children and the society of which they are members and is not contrary to accept it and customary rules touching such domestic relations. To this question there is but a single answer, and it is in the affirmative, and therefore, is strictly moral turpitude within the definitions of the cases last cited. More than this, as the Court below concedes, both in Pennsylvania the State in which the default occurred and in New Jersey where the cause was tried it is by statute denominated a misdemeanor, and is a misdemeanor of such importance that the statutes of both States prescribe a maximum fine of $500 and a maximum imprisonment of one year.

N. J. S. A. 2: 121-2 (1937);
18 *Purdon*, Section 4731;
(*Act of June 4, 1939*, P. L. 842 Section 731).

When we leave the zone of principle and enter the field of concrete adjudication, we find it laid down that a witness

may be asked for the purpose of impeaching his credibility upon cross-examination if he had been guilty of desertion.

Hamilton vs. People, 29 Mich. 173 (1874);
Jordan vs. State, 141 Ark. 504, 217 Southwestern 588 (1920).

There is still another approach to this question which will carry us to the same destination. It is in the domain of tort touching the offense of libel. We know that a charge involving moral turpitude and indictable is libelous per se

Pollard vs. Lyon, 91 U. S. 225 (1875);
Sipp vs. Coleman, 179 Fed. 997 (1910);

and we know that published words charging a wife with deserting her husband is libelous per se

Smith vs. Smith, 73 Mich. 445, 91 NW 499 (1889);

a fortiori, desertion of a spouse is an act of moral turpitude, consequently it was error to forbid the cross-examination of Leo DeLeone to disclose his moral turpitude where that turpitude in its inherent character showed mental and moral depravity.

Arnold vs. U. S., 94 Fed. 2d 506 (1938).

As we approach the conclusion of this phase of the argument it may be useful in passing to refer to that category of cases which by force in the reasoning of the Court below must be the minority cases. They are

Fisher vs. United States, 8 Fed. 2d 978 (1925) Certiorari denied. 271 U. S. 666;
Merrill vs. United States, 6 Fed. 2d 120 (1925);
United States vs. Liddy, 2 Fed. 2d 60 (1924);

and into this strange company likewise falls a case decided by the Court below, that is the Circuit Court of Appeals for the Third Circuit namely

> *Mausbach vs. United States*, 11 Fed. (2d) 224 (1926).

Of course, these four cases are free of the heresy of crimen falsi and probably do not contain any factor of moral turpitude as the same falls within the definition of that phrase, ante. They do involve misdemeanors, and cross-examination predicated thereon was held proper in each of the four instances. We, therefore, think that the Court below has fallen into error in its holding that the petitioner had no right to cross-examine the Government's witness Leo DeLeone as to the fact of his prior conviction for the desertion of his wife and children in Philadelphia and that this is plain reversible error

> *Alford vs. United States, supra;*
>
> *Arnold vs. United States, supra.*

After all, all that the petitioner strives for is a mere return to fundamentals, and these fundamentals in their original purity are best presented by the distinguished Chief Justice Taft while still in the 6th Circuit

> "The question whether the conviction of a felony was competent at common law to impeach the credibility of a witness could not arise because the witness was absolutely disqualified. When *as the conviction of a less crime than a felony had always been competent in impeachment* the conviction of a felony would a fortiori be relevant for the same purpose."

> *Baltimore & Ohio R. R. Co. vs. Rambo*, 59 Fed. 79 (1893);

and rescue the situation from the chaos which has driven Professor Wigmore into despair.

Wigmore on Evidence, 3rd edition, section 987.

(C) That a conviction of a convict of a criminal offense necessarily proves the convict to be the offender.

This Court may regard the petitioner's necessity to lay down the above proposition as frivolous or startling. This would certainly likewise be the writer's conclusion, but, for the fact that that part of the opinion of the Court below which has been made the basis of this argument when dealing with the effect with the proof of the conviction in regard thereto states "the fault in such regard might not even lie with the one (the convict) sought to be impeached." (Record p. 54)

This is truely baffling because we know that the judgment in the criminal case imports verity when collaterally assailed. Until corrected in a direct proceeding it says what it was meant to say, and this by an irrebuttable presumption. In any collateral inquiry a Court will close its ears to a suggestion that the sentence entered in the minutes is something other than the sentence of the Judge.

Hill vs. Wampler, 298 U. S. 464 (1935).

(D) That the refusal to permit by cross examination to show the conviction of crime by a Pennsylvania court for the purpose of impeachment in a trial in the Federal District Court for New Jersey violates the full faith and credit clause of the Constitution, Section 1, Article 4.

It is of course true that by reason of the action of the Trial Court in cutting off the cross-examination, made it impossible to offer the record of the Pennsylvania conviction and consequently it was not offered.

In that state of the record the petitioner contends that the proceedings in the Domestic Relations Court of Philadelphia against the Government's witness Leo DeLeone, by and in which he was convicted of deserting his wife and children was unquestionably a judicial proceeding of the State of Pennsylvania and no authorities are necessary to prove that. Since that is true, we submit that the action of the Court below in affirming the action of the trial Court in that particular in a tentative and undeveloped state in which the matter was cut off, accomplished the cutting off of all inquiry as to the proceedings, so that, no proper predicate could be laid for the introduction of the record thereof. Obviously such procedure then gave those proceedings no faith or credit whatsoever, and thus, effected the clearest violation of the simple words of this Constitutional mandate. The petitioner concedes that this provision of the Constitution is not self-executing and consequently to make it effective, revised statute 905 was passed and now constitutes section 28 U. S. C. A. 687. The Constitutional mandate and this section taken together demonstrate that the mischief of the present situation must clearly fall within its purview, but the petitioner is obliged to confess that his extended examination of the authorities reveals no precedent approximating the present situation. The

question is therefore novel and unique and being such presents the best reason why it should now be reviewed in this Court. There is however indicia which shows that the contention now raised is far from fantastic. That this is true, seems to us to be made manifest by the case of

People vs. Reese, 250 N. Y. Supp. 392, 232 App. Div. 624 (1931)

holding that a record of foreign criminal proceedings had, is admissible to show the criminal quality of an interested party in the subsequent criminal trial under the aegis of this Constitutional provision.

The soundness of this approach is demonstrated by the language of Taylor CJ in disposing of a somewhat analogous situation when he stated "As truth and justice are not confined by geographical limits but are co-extensive with the concerns and relations of civilized communities the crime which renders a witness incompetent in one country must do so in all."

State vs. Candler, 3 Hawks. 307 (NC 1824)

See also:

Federal Coal Co. vs. Royal Bank of Canada, 10 Fed. 2d 679 (1926);

and that we do not quite fill the role of pioneers in this direction, we think is proven by the Supreme Court of New Hampshire which in

Chase vs. Blodgett, 10 N. H. 22 (1838);

seems to hold that this is a necessary result under the full faith and credit clause of the Federal Constitution *supra*.

VI. CONCLUSION

The petitioner therefore contends in leaving the matter that the true and correct legal situation arising upon this record as tested by principle and authority is

(a) That in Federal Courts the doctrine of crimen falsi did not at the time of trial exist.

(b) That since the doctrine of crimen falsi was non-existent at the time of trial it could not become the basis of a limitation of the right of cross-examination.

(c) That for the purpose of impeachment of the credibility of a witness in the criminal case in the Federal Courts he may be asked anything which does not incriminate him or expose him to penalty of forfeiture.

(d) That if the right of cross-examination for the purpose of impeachment is limited by the factor of moral turpitude, the desertion of wife and children constitutes such moral turpitude with or without the condemnation of any criminal statute.

(e) That the record of criminal conviction irrebuttably shows that the convict is culpable as to every element essential to establish criminal responsibility.

(f) That the prohibition of cross-examination to show the conviction of the witness, sought to be impeached, by the Courts of Pennsylvania at the trial of the Federal Court of New Jersey was in direct violation of Section 1, Article 4 of the Federal Constitution.

All of which propositions, the petitioner submits, the Court below erroneously rejected or ignored and as all are of great public importance, the petitioner asserts that the case made by the present record urgently calls for

examination and revision by this Court for which reason the certiorari should issue as prayed for to the end and purpose that the judgment of the United States Court of Appeals for the Third Circuit and of the District Court of the United States for the District of New Jersey be reversed and the cause be remanded to the latter Court for a new trial.

Respectfully submitted,
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April 2, 1942.